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In the Supreme Court of the United States

OCTOBER TERM, 1966

NOS. 462 AND 463

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (PSS Pet. App. A, pp. 2a–16a; Sec'y Pet. App. A, pp. 21–38)[1] is reported at 358 F. 2d 840. The opinions and orders of the Federal Power Commission (R. 609–717, 780–805) are reported at 31 FPC 247 and 1051. The decision of the Examiner (R. 315–494) is reported at 31 FPC 305.

[1] The petition of the Washington Public Power Supply System we designate "PSS Pet. —". The Secretary of Interior petition will be designated "Sec'y Pet. —".

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1966 (Sec'y Pet. App. B, pp. 39–41). On June 21, 1966, the Chief Justice extended the time for filing petitions for writs of certiorari to and including August 21, 1966. The petitions for writs of certiorari were filed on August 19, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

1. Under Section 7(b) of the Federal Power Act the Commission may not issue a license for a hydroelectric project if, in its judgment, such development should be undertaken by the United States. The question presented by the Secretary of the Interior's petition is whether the Commission reasonably exercised its judgment that federal development should not be recommended in this case.

2. With respect to the petition of the Washington Public Power Supply System, the question presented is whether the Commission's construction of the scope of the preliminary permit issued to the Pacific Northwest Power Company was reasonable.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act, 49 Stat. 838, *et seq.*, as amended, 16 U.S.C. 791a–825r, are set forth in the Appendix, *infra*, pp. 39–46.

STATEMENT

Petitioners seek review of a decision of the Court of Appeals for the District of Columbia Circuit af-

firming an order of the Federal Power Commission issued February 5, 1964. By that order, the Commission granted a license to the Pacific Northwest Power Company for the construction, operation, and maintenance of a major hydroelectric project on the Snake River just above its confluence with the Salmon River at a site known as High Mountain Sheep.

Background.—The Snake River flows 1073 miles from its headwaters in western Wyoming to its confluence with the Columbia River. From that point, the Columbia flows an additional 324 miles to the Pacific Ocean. Approximately 188.3 miles from its downstream terminus (*i.e.*, at "river mile" 188.3) the Snake is joined by the Salmon River (R. 837, 838).

Since at least the Corps of Engineers' 1949 report to Congress on the Columbia River and its tributaries,[2] it has been apparent that comprehensive development of the Columbia River basin required ultimate construction of a dam in the vicinity of the Snake's confluence with the Salmon, with the exact location depending largely on how the most power could be developed with the least impairment of the important anadromous fish resources of that area. Thereafter, in March 1954, another Corps of Engineers' report to Congress included a recommendation of the Bureau of Reclamation for approval of a plan of development consisting of two dams, one at Mountain Sheep and one at Pleasant Valley, to develop the full fall of the 55 mile section of the Snake River between the upstream Hells Canyon Dam and the Mountain Sheep site, above the confluence with the Salmon. S. Doc. No. 51, 84th Cong., 1st Sess., p. 165.

[2] H. Doc. No. 531, 81st Cong., 2d Sess.

On November 9, 1954, Pacific Northwest Power Company[3] applied for a preliminary permit[4] for a project which would have included dams at Mountain Sheep at river mile 192.6 and Pleasant Valley at river mile 213.2. As described in the application, the overall project was similar—though not identical—to that proposed by the Bureau of Reclamation. The permit was issued on April 8, 1955, to be effective for a 3-year period commencing April 1, 1955 (R. 151).

Pursuant to the permit, the Pacific Northwest Power Company assembled the necessary data and filed a license application for the two-dam Mountain Sheep-Pleasant Valley project on September 7, 1955 (R. 835). While the Washington Public Power Supply System, the competing applicant here and petitioner in No. 462, was not a party to that license proceeding,[5] the National Hells Canyon Association and the Northwest Public Power Association, described by the Power Supply System as its predecessors in interest (R. 718), did participate in the hearing on

[3] Pacific Northwest is a wholly owned subsidiary of four sponsoring companies, the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company (R. 610).

[4] Section 4(f) of the Federal Power Act, App. *infra*, p. 39, authorizes the Commission to "issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof * * *." Section 5, *infra*, p. 39, provides that preliminary permits shall be issued for the sole purpose of maintaining priority of applications of a permittee's license application. Section 9, *infra*, pp. 40–41, describes the data required in a license application.

[5] The Power Supply System was created by order of the Washington Department of Conservation and Development in January, 1957 (R. 251–254).

the application, advocating federal development of a project at the Nez Perce site just below the confluence of the Snake with the Salmon River (R. 851). The Department of Interior did not participate as a party and did not, in its report to the Commission, suggest that any dam or combination of dams in this stretch of the Snake should be federally developed. The Commission, reversing its Examiner, denied the application on the ground that the two-dam project was not best adapted to a comprehensive plan of development, as required by Section 10(a) of the Power Act, *infra*, App., p. 41, and expressed the view that "any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce" (R. 842). This conclusion was predicated on the expectation, later shown to be unjustified, that the fish passage problem at Nez Perce could be solved within a reasonable time.

On March 31, 1958, soon after denial of its application for the two-dam project and within the period of its permit, Pacific Northwest filed its license application for the High Mountain Sheep project with a single high dam to develop the full fall of the Snake above river mile 189.2 up the Hells Canyon site (R. 611). From the spring of 1958 through the spring of 1960, the Power Supply System, which had come into existence in January 1957, did nothing to indicate that it was interested in obtaining a license for any Middle Snake project. Then on March 15, 1960, after the Commission had scheduled a hearing on Pacific Northwest's license application to begin on March 21, 1960, the Power Supply System filed an

application for a license for a project at river mile 186.2, the Nez Perce site (R. 247). Since the two license applications would each develop the full fall of the river up to the Hells Canyon site and were thus mutually exclusive, the proceedings were consolidated (R. 258). Extensive hearings commenced on November 4, 1960, and concluded on July 24, 1961, except for a single session on September 12, 1961 (R. 612). The proceedings resulted in a record of more than 29,000 pages. All parties[6] were afforded an opportunity to present evidence and to file initial briefs, reply briefs, and supplemental briefs—the last as a result of the Commission's order of July 6, 1962 (R. 314), reopening the record to permit inclusion of a letter (R. 309–313) to the Chairman of the Commission setting forth a revised position of the Secretary of the Interior.

Toward the conclusion of the hearing, on April 24, 1961, the Power Supply System filed a motion for leave to amend its application so as to include plans for its version of a High Mountain Sheep project (R. 284). The motion was denied by the Examiner but the Commission subsequently permitted the requested amendment (R. 683).

The Examiner's initial decision.—On October 8, 1962, the Examiner recommended that a license for the construction of the multi-purpose hydroelectric project at High Mountain Sheep be awarded to Pacific Northwest. His decision recognized, as had all the parties, that to meet the standards of Section 10(a) of the Act, *infra*, p. 41, it was not only necessary to consider and compare the specific projects for which

[6] The numerous parties are listed at R. 322–324.

licenses were sought, *i.e.*, projects with dams at Nez Perce or High Mountain Sheep, but also to determine whether a project at either site would be compatible with a comprehensive plan of development for that stretch of the Snake River, taking into consideration power benefits, flood control, navigation, irrigation, recreation, fish, wildlife, and other beneficial public uses (R. 394–395). The Examiner explained (R. 430) that federal development should be recommended when non-federal development would not result in the optimum development of the resources.

The Examiner concluded that a comprehensive plan based upon the High Mountain Sheep proposal, which included the eventual development of several projects on both the Salmon and Snake Rivers in addition to the presently proposed High Mountain Sheep project, best met the Section 10(a) standards since it provided, *inter alia,* for greater power production than the Nez Perce plan, greater flood control benefits and, in particular, better provided for the preservation and maintenance of existing anadromous fish runs (R. 460).

He also concluded that Pacific Northwest had a statutory priority for its application for the High Mountain Sheep project by virtue of the preliminary permit issued on April 8, 1955 (R. 410–418), so that the Power Supply System was not entitled to assert a preference under Section 7(a) of the Act, *infra,* p. 40. In addition, he found (R. 456) that the Power Supply System application was deficient, *inter alia,* in failing to establish a need or a market for the power from either project and in failing to show its ability to finance construction of either project.

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With respect to federal development, which he did not recommend, the Examiner, after a detailed discussion (R. 426–439), concluded (R. 439–440) "that construction and operation of the High Mountain Sheep Project under license by the Commission will effectuate comprehensive development in the public interest on a comparable basis with Federal development. There is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary."

In reaching this conclusion, he pointed out first (R. 432) that the Secretary of the Interior, while urging federal development, agreed that the High Mountain Sheep Dam on the Snake River represents the optimum development. Then he discussed the various public benefits of such a development. Specifically, he found (R. 437) that the Corps of Engineers, which has primary jurisdiction over navigation and flood control, had formally advised the Commission that "the scope of the project and purposes served as proposed by the Applicant [Pacific Northwest] would be substantially the same as those which [the Corps had] proposed * * *." The Examiner and the Commission both included the license conditions for implementing these purposes as recommended by the Corps of Engineers.

The Examiner also concluded (R. 434) "that the public interest in the coordination of the High Mountain Sheep project with other projects in the Columbia River Basin will be as fully promoted and protected by the issuance of a license with appropriate conditions as by Federal development." In this respect he

pointed out that while coordination of an entire river basin under single ownership and operation is an appealing goal, it is unobtainable in the Columbia River Basin where "numerous non-Federal projects are now operating" and, where "coordination has been effected through the Northwest Power Pool and, more recently, the Coordination Agreement" (R. 432–433). The Examiner explained (R. 433) that the Coordination Agreement then in effect went far beyond "the limited downstream coordination proposed by the Secretary" in the letter stating his position to the Commission, and that the effectiveness of coordinates under that agreement had been attested to by Mr. Charles F. Luce (the then Administrator of the Bonneville Power Administration, and now Under Secretary of the Interior) who had explained to Congress (*ibid.*):

> * * * What we do under this agreement is operate these facilities [federal and non-federal] in unison, you might say, or in a coordinated way, to get the maximum production of power from them.

With respect to the Secretary's claim that a federal project would provide for effective fish passage "with greater flexibility and ease than a Commission licensee" the Examiner found that both license applicants had agreed to install any needed fishways and had submitted detailed plans proposing large expenditures, that the Commission would require needed fishways and future modifications to the extent required, and that the assertion that federal development would assure superior fish passage was not only unsupported

but was challenged by responsible State agencies (R. 435–436).

Finally, the Examiner concluded that in any realistic comparison of federal with non-federal construction the factor of delay had to be evaluated and that the record, which, *inter alia,* showed no present interest in construction by the Department of Interior and the united opposition to federal development by local interests in the Pacific Northwest, both public and private, demonstrated that authorization of federal development in the foreseeable future was very unlikely.

The Examiner thus concluded (R. 320):

> The public benefits, and comprehensive development which will be achieved by the construction of the High Mountain Sheep project can be effectuated now, with the issuance of a license for non-Federal development. If Federal development is recommended, as requested by the Secretary of the Interior, it will probably result in the postponement of any development of this site for an indefinite period of time.

The Commission's opinions.—The Commission, upon consideration of the numerous briefs and exceptions and oral argument, including those on behalf of both petitioners,[7] issued its opinon granting a license for a High Mountain Sheep project to the Pacific Northwest Power Company, agreeing unanimously

[7] On December 3, 1962, the Secretary of the Interior petitioned to intervene out of time (R. 494, 515) and for an extension of time in which to file exceptions to the Examiner's decision (R. 518). These requests were granted (R. 521).

that federal development should not be recommended, while dividing 3–2 on the priority issue raised by the Power Supply System.

The Commission opinion, which expressed substantial agreement with the Examiner's decision, first determined that a plan of development including a High Mountain Sheep project would provide the most comprehensive river basin development within the meaning of Section 10(a) of the Act (R. 613–641). The Commission then noted that "[h]aving narrowed the problem to the proposed HMS project and plan of development, we have before us PNPC's application for a license for this project, WPPSS's amendment of its Nez Perce application to include HMS, and the request of the Secretary of the Interior not to grant any license but to recommend Federal development" (R. 641).

As between Pacific Northwest and the Power Supply System, the Commission noted that the threshold problem was "whether PNPC has a priority under its preliminary permit" (R. 641) and concluded, two Commissioners dissenting, that Pacific Northwest enjoyed such a priority and that accordingly the Power Supply System was not entitled to a preference under Section 7(a) of the Act (R. 672).

With reference to the argument advanced by the Power Supply System that Pacific Northwest's permit was limited in geographic scope to the Mountain Sheep-Pleasant Valley project, the Commission explained (R. 642–646):

A preliminary permit is issued under Section 4(f) of the Act to enable an applicant for a license to make studies and gather data and at the same time under Section 5 to maintain its priority of application. * * *

We consider it evident that the statutory intent of these provisions is to give a permittee the first right to develop that reach of a river to which the permit relates. Any other interpretation would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee. * * *

To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's

guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. * * *

If priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior. Clearly, if such investigations were conducted and an alternative development were considered preferable, the first permittee would be in danger of losing its opportunity to develop needed generating capacity as a result of its own actions. Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources. * * * [Footnote omitted.]

The Commission found not only that Pacific Northwest was entitled to a statutory priority but also that "the plans of PNPC to develop the HMS site are best adapted to conserve and utilize in the public interest the water resources of the region, and PNPC

is able to carry out such plans" (R. 672).[8] Thus it awarded the license to Pacific Northwest not solely because it had a priority (which did no more than negate the Power Supply System's asserted preference) but because, in addition, it concluded that as between the two applicants Pacific Northwest clearly had the superior proposal.

With respect to federal development, the Commission expressed full agreement with the decision of the Examiner that such development should not be recommended. In so doing, the Commission rejected the Secretary's claim that Congress, by authorizing nine dams downstream from High Mountain Sheep, had bound the Commission to decide in favor of federal development under the terms of Section 7(b), pointing out, *inter alia*, that it had "previously authorized major non-government projects on the main stem of the Columbia above the confluence with the Snake and on the Snake above the HMS site * * *" (R. 665). With respect to flood control, navigation, recreational facilities, and the fish problem, the Commission concluded that it could "see nothing to lead us to believe that the Federal Government could do more." On the issue of whether

[8] The Power Supply System ignores this finding, claiming its High Mountain Sheep project is superior because its application proposed larger generating units than Pacific Northwest's application filed two years earlier when larger units were not available (R. 22). But the Commission found that the difference in the tentative construction features was not decisive (R. 641).

a federal High Mountain Sheep project would be better coordinated, electrically and hydraulically, with other affected projects in the river, the Commission stated (R. 667–668):

> * * * We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter *in the context of a river system which already has a number of different project operators and an existing co-ordination system, i.e., the Northwest Power Pool.*[39] * * * [Emphasis added.]
>
> [39] This Pool is a voluntary arrangement among utilities, both public and private in the Pacific Northwest area, including BPA, for the co-ordination and operation of their affected systems.

The Commission went on to explain that each of the four companies comprising Pacific Northwest had projects in the river basin, they were members of the Pool with good records of cooperation and that Pacific Northwest had designed its project to be operated and coordinated with the Northwest Power Pool for the benefit of all members (R. 668). To assure such coordination, the Commission incorporated into the license an Article patterned after the coordination article developed in 1962 for the Wells Project—a major non-governmental project in the Columbia River Basin (R. 668). Under this article

the license was conditioned to provide that the licensee must operate the project in complete co-ordination with other power systems "in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources." (See R. 784, n. 6). The Commission added (R. 668) that "[w]e have continuing jurisdiction and will insist that this be done. The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development".

In addition to concluding that "there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to PNPC even assuming that the actual choice we had before us was between federal construction now and non-federal construction now" (R. 668), the Commission emphasized (R. 668–669):

> * * * But these are not the true alternatives. The Department of Interior has frankly admitted it has no present intention of seeking authorization to commence construction or planning to construct an HMS project. Under these circumstances, federal construction of an HMS project is not foreseeable even assuming Congress would be willing to authorize a federal project where PNPC is willing and eager to construct it under the terms, conditions and provisions of the Federal Power Act.

The Commission, rejecting Interior's view that the power from High Mountain Sheep would not be

needed when the project would be completed, found that the "delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (*i.e.*, superior coordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (R. 669).

The Commission's decision on rehearing.—On rehearing, the Commission again carefully considered (R. 780–801) the contentions of both the Secretary and the Power Supply System. Specifically, it confirmed its original finding that there would be a regional need for High Mountain Sheep power by the time the project could go into operation. The Commission noted that while the Secretary had alluded to no facts to support his position, it had "nevertheless reexamined" the federal development issue and discussed at some length its reasons why it did not believe that federal development is essential in order to achieve the coordination necessary to obtain the maximum use of High Mountain Sheep for flood control, navigation and power purposes, and for believing in the efficacy of the license conditions dealing with those factors (R. 782–786).

It specifically discussed various questions which the Secretary had raised with respect to the coordination condition imposed by the Commission. Agreeing with Interior as to the need for full and comprehensive coordination, it modified the article to make express what previously had only been implied, *i.e.*, that the licensee's coordination obligations included

the duty to provide such additional transmission facilities as might prove necessary to full coordination. And the language of Article 14 was also changed to make clear that the public interest involved was in "maximiz[ing]" power production and other beneficial public uses (R. 786, 800). "Beyond the changes noted above" the Commission concluded (R. 786):

> * * * we are satisfied that Article 14 requires no further modification. We have described the general principles applicable thereto and do not consider it feasible to reduce them into concrete terms at this time.[9]

On the priority issue pressed by the Power Supply System, the Commission emphasized (R. 787), "WPPSS misunderstands the significance of the preference and priority provisions of the Act. The priority provisions were not designed to counter-

[9] The Commission did reject the contention by Interior that it should delete that part of the coordination Article providing for such equitable sharing of the benefits of coordination by the licensee as the Commission might order. It is this facet of the coordination issue, or rather the Department's continued misconstruction thereof, which prior to its instant petition has been its main source of objection. The Commission made clear in a footnote to its rehearing opinion that under no circumstances could the licensee share in the hydraulic "headwater" benefits which its project would provide to the downstream federal projects (R. 786). See also *Idaho Power Company*, 33 FPC 976) (1965). To the extent, however, that the licensee of the High Mountain Sheep project is otherwise required to maximize over-all power operations in the Pacific Northwest, the Commission believes some sharing of the financial benefits of such coordination may be appropriate. This issue, which the Secretary has now apparently dropped, does not relate to the question of whether the Commission properly concluded that a non-federal license would provide complete electrical and hydraulic coordination.

balance the preference rights of public bodies. * * * The priority provisions were drawn to afford protection to one who makes such investigations [under permits], irrespective of whether the party involved is a private or public agency." The Commission added (*ibid.*) that because of the move toward large scale generation and integration, "it is evident that the priority provisions of the Act will assume greater significance for municipal bodies as between themselves."

The court of appeals' decision.—The court below unanimously affirmed the Commission. With respect to the Power Supply System's contentions that Pacific Northwest was not entitled to priority under its permit, the Court concluded that the Commission construction of the permit provisions was not only reasonable but was plainly authorized by the Act. The Court also found without support the Secretary of the Interior's claims that Congress had preempted the High Mountain Sheep site by approving a number of downstream federal projects, that the Federal Power Act precluded any private development that would affect existing or planned federal developments, that the Commission's action was not supported by the record, and that the Secretary should have been permitted to introduce evidence which he had neither proffered nor described.

ARGUMENT

The Secretary of the Interior urges that it was error for the Commission to exercise its judgment against recommending federal development with-

out hearing additional evidence, while the Power Supply System contends that the court below erred in declining to upset the Commission's construction of the scope of the preliminary permit it had issued to Pacific Northwest. In essence both petitions, while clothed in general terms, challenge the exercise of the Commission's judgment in a particular proceeding and, in our view, raise no legal issues of general importance. The holding below that the Commission's decision was reasonable in all respects is fully supported, and no conflict is alleged. Accordingly, there is no warrant for further review by this Court.

1. The Secretary states (Pet. p. 12) that the question for this Court's plenary consideration is whether the Commission has an independent and affirmative responsibility to gather evidence on issues affecting the public interest where the parties before it are remiss in doing so. We dispute the conclusion that this issue is actually presented. The Commission fully agrees that it is not a mere umpire among competing parties and that it has the responsibility of affording the public interest full protection on the basis of a complete record.[10] We believe, however, that a fair reading of the Commission's opinion, including the adopted portions of the Examiner's decision, as well as an examination of the record, shows that the Commission fully and conscientiously met this responsibility here.

[10] This obligation, we agree, is in no way limited by the refusal of the Secretary of the Interior to permit his employees to present pertinent evidence requested, as he did here during the course of the hearing (R. 21, 139, 427).

The Secretary's assertion that the Commission did not properly exercise its judgment on the federal development question rests on the erroneous claim that there was no evidence bearing on this question in the record. Moreover, while the Secretary argues that the record is deficient and should be augmented by the Commission, his petition, like all his earlier pleadings to the Commission and the court below, is conspicuously silent on the nature of the additional evidence that he believes the Commission should consider. We suggest this silence reflects the fact that there is no evidentiary gap. Finally, the Secretary's belated recognition that the Commission was correct in concluding there was a present need for a High Mountain Sheep development is not, as he asserts, a basis for setting aside the Commission's independent ground for not recommending federal development—*i.e.*, that, even assuming present federal development might have been preferable, early nonfederal development was more in the public interest than the mere possibility of federal development sometime in the indefinite future.

(*a*) The premise of the Secretary's petition is that there was no evidence on which to decide between federal and non-federal development, an assumption apparently made because little of the evidence was in terms directed to this question. What the Secretary overlooks is that the Commission's decision on whether or not to recommend federal development is an integral part of its basic duty under Section 10(a) of the Act, *infra*, p. 41, to insure that any hydroelectric project it authorizes "will be best adapted to a com-

prehensive plan for improving or developing a waterway * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes". For under Section 7(b) the Commission must determine "whether a private applicant would adequately develop all the benefits that should be derived from the proposed site" (R. 431; *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 164). It is apparent, therefore, that in large measure the Commission must rely on the same evidence for its Section 10(a) and 7(b) evaluations.

To enable it to discharge these statutory responsibilities, the Commission at the very outset of the proceeding called upon the expert views of federal and State authorities competent in such matters as navigation, flood control, power development and utilization, protection of fishery and wildlife resources, irrigation and recreation. The record contains factual and opinion evidence on these points from such sources, as well as the very extensive evidence presented by the competing license applicants and the Commission's staff.

In view of the Secretary's overriding stress in his present petition on the need for coordination to maximize power development, a brief reference to some of the evidence actually introduced relating to this point seems appropriate. Detailed evidence was introduced on the power potentialities, both at site and downstream, of the project at High Mountain Sheep and on the effect of coordinated operations of

High Mountain Sheep with the other projects in the Columbia River Basin and particularly the downstream federal projects. For example, exhibits show the downstream power effect of High Mountain Sheep with both full and partial coordination (R. 305, 306). The evidence also shows, *inter alia,* that the addition of large amounts of Canadian storage will substantially diminish the downstream power effect of High Mountain Sheep storage (compare R. 305 with R. 307). The Secretary, who had relied on this data in his exceptions (R. 598–599), has never explained how new evidence would be different from that already in the record. The Secretary states (Pet., p. 9) that in his petition for rehearing to the Commission he offered to repair alleged evidentiary deficiencies. But the only specific deficiency there alleged was that the record did not show the difference in power production to be expected from non-coordinated operation as compared with coordinated operation (R. 737). As indicated above, it did.

In addition, the record shows, as the Commission found (R. 668), that Pacific Northwest had designed its project for full coordination, that the four power companies comprising Pacific Northwest had all been participating in the existing coordination arrangements and that the new short-term Pacific Northwest Coordination Agreement had been described by Mr. Luce, the Bonneville Administrator, in testimony to the Congress, as providing that "* * * all the generating facilities in the Pacific Northwest will be operated as

though they were under a single ownership * * *. What we do under this agreement is operate these facilities in unison * * * to get the maximum production of power from them." (R. 433, see, *supra*, p. 9.) [11]

Nevertheless, the Secretary contends (and this appears to be the heart of his petition) that there is no record support for the Commission's conclusion that the successful coordination and maximum power development, which the record shows *can* be achieved, *will* in fact result from non-federal development of the High Mountain Sheep project. Crucial to his position that there was an evidentiary deficiency is his claim that the Commission so admitted.

This misconceives the Commission's opinion. The Commission agreed that the Secretary or any other single operator of a series of developments in a river

[11] This agreement had, by the time of the Commission opinion, been supplemented by a ten year agreement, which soon after issuance of the Commission's order denying rehearing was supplemented by a long-term agreement with a term extending to the year 2003. These agreements, which have been submitted to the Commission as rate schedules, have repeatedly been described by Bonneville and its Administrator as providing for the operation by 15 parties of the plants "as though they were owned by only one owner for the most efficient production." Hearings before House Subcommittee on Public Works Appropriations for 1966, Part 2, 89th Cong., 1st Sess., p. 467. See also, *e.g.*, Hearings before Senate Subcommittee on Public Works Appropriations, 1964 (Bureau of Reclamation, and Department of the Interior Power Marketing Agencies), 88th Cong., 1st Sess. p. 52. (Mr. Luce: "We believe that the coordinated operations of hydro facilities in the Pacific Northwest is an outstanding example in the United States of cooperation between public and private power"). Bonneville Power Administration, 1964 Report of U.S. Columbia River Power System, p. 10; Bonneville Power Administration, 1963 Report of U.S. Columbia River Power System, p. 2.

basin could normally be expected to coordinate their operation easier than a multiplicity of owners. But, the Commission stated (R. 667–668) "there is no evidence upon which we can determine the scope or the seriousness of this matter *in the context of a river system which already has a number of different project operators and an existing co-ordination system*" (emphasis added).[12] It pointed out that the members of the PNPC group already were members of and had projects within the Northwest Power Pool, which also included federal Bonneville Power Administration, and that their record of coordination was good. Under these circumstances, it concluded that the "record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development" (R. 668 and see R. 782, 784–785).

This, we submit, is not a conclusion that the record is deficient to determine whether a non-federal licensee will provide optimum coordination, but an affirmation that in the light of the existing system of coordination throughout the widespread Columbia River system, plus the continuing authority of the Commission to direct the optimum degree of coordination should problems arise in the future, non-federal construction of High Mountain Sheep can and will provide optimum coordination. The prob-

[12] The Secretary only cites the first (or unitalicized) part of this sentence in his petition (see Sec'y Pet. pp. 8, 15). Moreover, the Secretary's petition fails to note that High Mountain Sheep must, as he has previously recognized (*e.g.*, R. 731), be coordinated with plants in the entire Columbia River Basin, not just the nine downstream federal dams to which his petition refers.

lem is not really an evidentiary one at all; in the light of the evidence of how a High Mountain Sheep Project can be coordinated into the existing and prospective Columbia River System, and the experience of the parties to the controversy in achieving optimum coordination with respect to the existing federal-non-federal mix, the Secretary's argument comes down to a simple disagreement with the Commission's conclusion. This of course is not a basis for setting aside the Commission decision.

While the Secretary suggests that more expert witnesses (for in fact witnesses on behalf of the license applicants testified on this issue) should have been called to explore the adequacy of the license condition on coordination, he does not suggest that even his experts, and in particular the then Bonneville Administrator, would confirm his assertions that the licensee cannot be trusted to meet its firm commitments to coordinate fully. To the contrary, the public record shows that his own experts in the field have stated that coordination among federal, public and private operators is achieving maximum regional power benefits. See, *supra*, p. 24.

(*b*) The Secretary also asserts (Sec'y Pet. pp. 6, 15) that the Commission's conditioning power is inadequate to assure that non-federal development of High Mountain Sheep will serve the various public purposes unrelated to power generation because (Sec'y Pet. pp. 6–7) a non-federal power producer cannot be expected to perform such functions prop-

erly since they are unremunerative. The Secretary's contention runs counter to Section 10(a) which expressly recognizes that licensees may be required to include, as part of their projects, facilities for beneficial non-power uses and that conditions may be imposed by the Commission to assure the best development. See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. The Secretary also ignores the salient economic fact that, so long as a hydroelectric project produces power at a lower annual cost (including non-power costs) than other alternative sources, a license, and its retention, is a valuable asset to the developer. Indeed, were this not the case, Pacific Northwest would not have sought the license issued here.[13] And if the licensee does not comply with the conditions imposed by the Commission, not only may the terms of the license be specifically enforced but, in addition, the license may be revoked and penalties and forfeitures may be assessed against the licensee. See Sections 26, 315, 316 and 317, *infra*, pp. 43–46.

Moreover, while the Secretary claims that non-power functions are unremunerative, this is plainly not so. For in computing a licensee's power costs in fixing rates, both the Commission and the State Com-

[13] The value of this project to the licensee is shown by the record. As the Commission discusses (R. 617–618), the annual costs of producing power at High Mountain Sheep, including depreciation and return on investment for power and non-power facilities, are more than $4 million less than alternative sources of power for Pacific Northwest.

missions responsible for retail rate regulation include both the costs of non-power facilities (through depreciation and return on investment) and the operating expenses related thereto. In other words, the power company will pass on all of the costs of non-power facilities to the power consumer and such investments and operations will be just as remunerative to it as those relating to power facilities.

The Secretary's further assertion (Sec'y Pet. pp. 16–17) that High Mountain Sheep will "primarily serve to enhance the power capacity of other federal dams * * *" has no record basis. The record shows to the contrary that, with full coordination and the use of waters made available by Canadian storage, on-site generation of nominal prime energy at High Mountain Sheep will be at least ten times as great as the downstream prime energy benefits resulting from High Mountain Sheep storage (R. 307). Similarly, the on-site average energy generation at High Mountain Sheep is at least 40 times as great as the comparable downstream effect from High Mountain Sheep (R. 307).[14]

(*c*) The Secretary suggests (Pet. 17) that the staleness of the record constitutes a "further reason" for setting aside the Commission's decision. In our view, this claim illustrates a basic weakness in the Secretary's position.

Before the Commission the Secretary argued strongly that no High Mountain Sheep project was

[14] Prior to the effect of Canadian storage, though it now appears that High Mountain Sheep power will not come into operation before such storage, the on-site benefits would not exceed downstream benefits by such large amounts (R. 305).

needed or useful at the time, and made clear that the practical alternative before the Commission was not whether there should be federal or non-federal operation at this time but rather whether there should be a non-federal project now or no project for the foreseeable future. The Commission found there was a real current need for the project (R. 657–659, 781–782).[15] And it stressed, as an independent ground for refusing to conclude that development at High Mountain Sheep should be undertaken by the United States itself, that "the delay inherent in federal construction

[15] The argument before the Commission that no High Mountain Sheep project was then useful is, of course, inconsistent with the present contention of the Secretary, that High Mountain Sheep can perform a unique function as a "regulating reservoir" aiding the power potential of the downstream federal developments (Pet. 14). Apparently, to the Secretary, the off-chance that coordination may not be perfect outweighs the need for early enhancement of downstream power potential.

In any event, while the High Mountain Sheep project is undoubtedly an important and major hydroelectric project, it is not "unique" as the Secretary claims (*e.g.*, Sec'y Pet. p. 14) as the only remaining site suitable for a regulatory reservoir that will serve the downstream federal dams. Thus, the federal Dworshak Dam now under construction on the North Fork of the Clearwater River will provide usable storage of 2 million acre-feet (which is comparable to that of High Mountain Sheep) for all of the federal downstream dams except the proposed Asotin project (R. 620). In addition, the proposed Penny Cliffs Project on the Middle Fork of the Clearwater River would also provide more than 2 million acre-feet of usable storage for the same portion of the Snake and Columbia rivers (see, H. Doc. 403, 87th Cong., 2d Sess., Vol. 1, p. 303), while the Lower Canyon Project could provide more than 3 million acre-feet of usable storage (R. 620). Of course, if the National Wild Rivers Bill, to which the Secretary has referred (Pet. p. 18, n. 6) were to be enacted, the chances of constructing the two latter projects would be lessened.

would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (*i.e.*, superior coordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (R. 669).

The Secretary does not here challenge the Commission's conclusion that High Mountain Sheep is needed. On the contrary, the alleged staleness of the record lies in the Secretary's belated recognition, first acknowledged in the present petition, that the Commission was correct in its conclusion. But certainly the Secretary's present agreement with the Commission's earlier conclusion that development of the High Mountain Sheep site now is required by the public interest, does not constitute a basis for setting aside this independent ground for the Commission's determination not to recommend federal development. The fallacy in the Secretary's argument lies in the fact that the validity of the Commission's decision must be determined as of the time it was made.

Moreover, even in its own terms the position of the Secretary lacks substance. For the immediate alternative to an affirmance of the license, which will permit Pacific Northwest to proceed with construction forthwith, is not federal construction or even a Commission recommendation therefor but a new proceeding before the Commission to decide how it should exercise its discretion. At best this would result in considerable delay before either a private licensee or the federal government could hope to get into opera-

tion the project the Secretary now agrees justifies "early development".[16]

2. While the Power Supply System argues at length (Pet. pp. 12–19, 21–25) that the Commission's construction of the preliminary permit issued to Pacific Northwest is inconsistent with the purposes of the Act, it also expressly concedes (Pet. p. 20) that the Commission could have issued a permit broad enough to cover the High Mountain Sheep site as well as the sites specifically described. It is thus apparent that the question raised by the Power Supply System does not present any question of statutory interpretation. Instead, it simply questions the propriety of the Commission's construction of the particular preliminary permit involved here.[17]

In any event, petitioner's contention that the broad scope given the preliminary permit in the present case is inconsistent with the preference afforded public

[16] Insofar as the possibility of federal development is concerned, experience indicates that in the situation where there is a non-federal applicant willing and able to construct essentially the same project, Congress is reluctant to authorize federal construction.

The history of the China Gardens project immediately downstream from High Mountain Sheep seems instructive. This project had been authorized for federal construction by both the House and Senate, but was deleted in conferences after the Examiner recommended private development of High Mountain Sheep and Pacific Northwest advised the Senate of its willingness to construct the China Gardens project as well. 108 Cong. Rec. 23412; Hearings before the Senate Committee on Public Works, Subcommittee on Rivers and Harbors, Flood Control—1962, 87th Cong., 2d Sess., Part 2, pp. 270, 287, 290–293.
of appeals concurred.

[17] A construction with which the hearing Examiner and court of appeals concured.

agencies by Section 7(a) of the Act not only ignores the purpose and role of preliminary permits in the scheme of the Power Act, but completely overlooks the fact that preliminary permits afford a substantial degree of protection to preference agencies as well as private power companies.[18]

The authors of the Federal Power Act recognized that preliminary investigations relating to development of the nation's water resources can involve substantial expense. See, *e.g.*, Hearings before the House Committee on Water Power, 65th Cong., 2d Sess., pp. 54–55. Accordingly, the Act was drafted so as to provide a degree of protection to persons who risk their capital and incur such expense. Specifically, the Act provides that the Commission may issue preliminary permits which, although they do not guarantee the issuance of a license to the permittee, do protect him against competing applicants who—but for the permit—would be entitled to preference in the award of a license and applicants whose overall plans are not markedly superior to those of the permittee.

It must be stressed, however, that the priority afforded is by no means absolute; it does not protect

[18] Of the twenty-one preliminary permits now outstanding (including those permits for which license applications are pending), eight were issued to applicants which, under the provisions of Section 7(a) of the Act, would be preference agencies.

the permittee against a superior competing application.[19]

Thus, in the present case the Commission did not stop with the findings that Pacific Northwest had a valid priority and plans for development meeting the statutory requirements for a license. Instead, it went on to compare the two applicants and found Pacific Northwest's overall plans and qualifications to be superior to those of the Power Supply System.

Section 10(a) of the Act, as we have seen, forbids the issuance of any license unless "the project adopted, including the maps, plans, and specifications" is "best adapted to a comprehensive plan for improving or developing a water way" with reference to interstate and foreign commerce, the development of hydroelectric power, recreation, and other beneficial public uses. It follows that a proposed project as described in an application for preliminary permit may undergo substantial modification prior to being licensed; in fact, Section 10(a) empowers the Commission to require such modification. Indeed, the Commission's experience has shown that there are invariably devia-

[19] What priority does is to afford protection against a preference applicant who under Section 7(a) of the Act would, in the absence of a priority, be able to claim the license if within a reasonable period it could bring clearly inferior plans up to par with the superior proposal of a non-preference applicant who had done the basic job of planning for optimum development.

tions between the plans submitted with the application for a preliminary permit and the plans which, in the Commission's final judgment, are best adapted to a comprehensive plan of development (R. 644–645). A permit such as that issued to Pacific Northwest in this case would therefore have little value if, as petitioner argues, the priority afforded protection only if the plan adopted was virtually identical to the one described in the application for preliminary permit.[20] If such a permit is to have any realistic meaning, a permittee's priority must cover the project as modified to conform to the Commission's final determination of the project best adapted within the meaning of Section 10(a).

Petitioner's further suggestion (PSS Pet. pp. 13–14) that if the permit had expressly mentioned

[20] Preliminary permits, and applications therefore, have typically described proposed projects in considerable detail. As the Commission explained (R. 646–648, 793–795) specificity in applications for permits was prescribed by Commission regulation so as to keep land withdrawals under Section 24 of the Act, *infra*, pp. 41–43 to a minimum. But specificity for this purpose need not define the scope of the priority where changes in project boundaries are necessary to develop the project best adapted to a comprehensive plan. And, contrary to petitioners' assertion (PPS Pet. pp. 5, 21–24), the scope of the priority beyond the geographic scope of the proposed project does not result in land withdrawals outside of the area specifically described.

a dam at High Mountain Sheep, non-federal public agencies would have asserted a preference under Section 7(a) to obtain such a permit for themselves is at odds with the relevant historical facts. The Power Supply System's failure to assert a preference when the permit was issued in no way resulted from any lack of notice but is realistically explained, as the Commission recognized (R. 792–793), by the fact that the Power Supply System's predecessors in interest were seeking federal development and had no intention, at that time, of undertaking either actual construction of any project [21] or the large expenditures required to fulfill the obligations under a preliminary permit.

Petitioner's assertion (PSS Pet. pp. 27–28) that the Commission failed to apply Section 4.84 of the Commission's Regulations (PSS Pet. App. p. 180a) governing amendments of preliminary permits is also baseless. Indeed, the claim that Pacific Northwest should have sought an amendment to its permit and that its failure to do so resulted in a deprivation of

[21] Indeed, as late as 1961 the managing director of the Power Supply System testified that (R. 21, 793) "had [Pacific Northwest] * * * seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project."

notice simply reflects petitioner's refusal to recognize that a permit application puts potential preference applicants on notice that a permit will afford priority even if additional lands or a different nearby site is needed to develop the best adapted project.[22] As the Commission explained (R. 653–654, 790–792), requiring an amendment whenever a permittee concludes that the geographic boundary of the project for which it will request a license exceeds that of the project tentatively described in the permit is not in accord with the Commission's past practices (*e.g., Montana Power Co.,* 17 FPC 834), and would afford a permittee "no flexibility to develop the best project on the reach involved" (R. 790). For petitioner's position necessarily is not only that any change in site or area necessitates an amendment but, more significantly, that no such amendment can be allowed if non-federal public agencies assert their claim to preference at that point. As the Commission indicated (R. 790) such a position is inconsistent with the basic purpose of the Act to secure optimum river development since a permittee would be reluctant to jeopardize his priority by seeking an amendment in a situation where his preliminary investigation had

[22] Petitioner's argument fallaciously assumes that the Commission's Regulations specify *when* amendments must be sought though that regulation (PSS Pet., App. p. 180a) on its face merely spells out the procedure to be followed *if* an amendment is requested, as for example when the original term of a permit is sought to be extended. The Act makes no reference to amendments to permits and the Commission's Regulation's were silent on such amendments until publication of revised Regulations in 1937. 2 Fed. Reg. 82, 93.

revealed a site superior to that described in the permit.[23]

Finally, petitioner's assertion (PSS Pet. pp. 24–25) that the Commission's decision impairs comprehensive river basin planning by not according accurate notice to the federal and state agencies interested in such development planning reflects its misapprehension of the nature and objective of a permit. As the permit in this case illustrates, a permittee is required to develop his plans in consultation with the affected federal and state agencies (R. 646). But, more important, the issuance of a permit authorizing the permittee to investigate and formulate plans for a project meeting the statutory standards does not give the permittee any rights to a license or in any way disadvantages affected state and federal agencies when the permittee subsequently seeks a license. To the extent an interested agency may not have had advance information with respect to a proposal affecting its interest, the only result will be delay in processing the subsequent license application.

[23] The Commissioners dissenting on this phase of the case concluded (R. 802) that an "applicant would obviously be entitled to routine approval of an amendment to his permit" in cases where his exploration at the project site indicated that changes in the project were desirable. But if this is the case an amendment would not serve the notice function claimed by petitioner.

CONCLUSION

For these reasons, both petitions for writs of certiorari should be denied.

Respectfully submitted,

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The filing of this brief has been authorized by the Solicitor General.

THURGOOD MARSHALL,
Solicitor General.

OCTOBER 1966.

APPENDIX

The Federal Power Act, August 26, 1935, c. 687, 49 Stat. 838, *et seq.*, as amended, 16 U.S.C. 791a–825r, provides in pertinent part:

> SEC. 4. (f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.
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> * * * * *
>
> SEC. 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.
>
> * * * * *

SEC. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

* * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such

changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

* * * * *

SEC. 10. (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 24. [As amended August 26, 1935, and May 28, 1948.] Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the dis-

trict in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided,* That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further,* That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites,

are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any politieal subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application. [41 Stat. 1075, 49 Stat. 846, 62 Stat. 275; 16 U.S.C. 818]

* * * * *

SEC. 26. That the Attorney General may, on request of the commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a

license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

* * * * *

SEC. 315. (a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty.

(b) The forfeitures provided for in this Act shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in

the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

SEC. 316. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secretary of the Army under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

SEC. 317. The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule,

regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this Act.

* * * * *

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